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No. [redacted] 27

HEGEMAN FARMS CORPORATION,

Appellant,

vs.

CHARLES H. BALDWIN, THOMAS FARRAN, Jr., AND KENNETH F. FEE, as Members of the Milk Control Board of the State of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 988

HEGEMAN FARMS CORPORATION,

Appellant,

vs.

CHARLES H. BALDWIN, THOMAS PARRAN, JR., AND KENNETH F. FEE, AS MEMBERS OF THE MILK CONTROL BOARD OF THE STATE OF NEW YORK,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant, plaintiff below, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully shows:

I.

Statutory provisions believed to sustain the jurisdiction:

Sections 238 and 266, Judicial Code, as amended by Act of February 13, 1925;

28 U. S. Code, Sections 345 and 380.

II.

Statute of the State and orders issued by appellees, defendants below, thereunder, the validity of which statute and orders is involved:

The statute the validity of which is involved is Chapter 158 of the Laws of 1933 of the State of New York, which statute added a new article known as Article 25 to the Agricultural and Markets Law of the State of New York. The said statute consists of nineteen sections numbered Section 300 to Section 319 inclusive.

The orders promulgated by appellees, and the validity of which is herein involved, are as follows:

(a) Order fixing $1.88 per 100 pounds for milk containing 3-5/10% butter fat plus an additional $.04 per hundred pounds for each additional 1/10th of 1% of butter fat content as the price which milk dealers of the class including appellant must pay for milk after May 16, 1933, which order was in force from May 16, 1933 to July 21, 1933.

(b) Order fixing $2.23 per 100 pounds for milk containing 3.5% of butter fat content, plus a $.07½ charge which was designated as a freight differential, plus $.04 for each additional 1/10 of 1% of butter fat content over and above 3.5% as the price which milk dealers of the class including appellant must pay for milk after July 21, 1933, which order has since been in effect.

(c) Order fixing $.08 per quart as the minimum price for which milk of the grade known as Grade B milk could be sold in the City of New York at wholesale after May 16, 1933, which said grade of milk is the grade that at all times herein involved has been sold by appellant, all of whose sales are made in the City of New York, and which said order remained in force between May 16, 1933 and July 21, 1933.

(d) Order fixing $.09 per quart as the minimum price for which milk of the grade known as Grade B milk could be sold in the City of New York at wholesale after July 21,

1933, which said grade of milk is the grade that at all times herein involved has been sold by appellant, all of whose sales are made in the City of New York, and which said order was in force at all times herein involved.

(e) Order fixing the prices at which fluid cream could be sold at wholesale within the City of New York after May 16, 1933, at $.27, $.39, and $.45 per quart, the variance in such prices being dependent upon the difference in the butter fat content of said fluid cream, and which order remained in force until July 21, 1933.

(f) Order fixing the prices at which fluid cream could be sold at wholesale within the City of New York after July 21, 1933, at $.31, $.44, and $.53 per quart, the variance in such prices being dependent upon the difference in the butter fat content of said fluid cream, and which order remained in full force and effect at all times herein involved.

(g) Orders dated December 29th and December 30, 1933, revoking appellant's license as a wholesale milk dealer unless appellant pay to the milk producers which sold milk to appellant during May, June, July, August, and September of 1933, an amount specified in the order of appellees dated December 30, 1933, for each 100 pounds of milk purchased by appellant during said period.

III.

Date of decree sought to be reviewed: March 27, 1934. Entered March 28, 1934.

IV.

Date of presenting application for appeal: March 26, 1934.

V.

Statement showing nature of case and rulings of District Court:

Plaintiff is a domestic corporation of New York State engaged in business as a wholesale milk dealer in that State in buying milk from producers and reselling it in New York City as cream and as Grade B milk. Plaintiff has done an average annual business of $750,000 for the past five years and the present value of the physical properties devoted to its business is approximately $450,000.

This action was brought in the United States District Court for the Southern District of New York, to enjoin appellees, acting in their capacity as the Milk Control Board of the State of New York, from enforcing against appellant certain orders made by them in such capacity. Appellant contended that the statute, under the authority of which the orders were made, was invalid as depriving appellant of its property without due process of law and denying to appellant the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellant further contended that irrespective of the validity of the statute the orders sought to be enforced by appellees against appellant were invalid in that they deprived appellant of its property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the prices fixed by the orders of appellees at which milk must be purchased and sold were such as to prevent appellant from earning a fair return or any return on the present value of the properties devoted to the carrying on of its business.

The court below found, among other findings of fact, that "the difference between the prices fixed by the defend-

ants (appellees) as the minimum prices plaintiff (appellant) must pay for milk purchased by it from producers, and the prices at which such milk could be sold, whether in the form of Grade B milk or fluid cream, has at all times been and now is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation".

Appellees claim that appellant had purchased milk from producers at prices less than those fixed by appellees in their orders governing the prices to be paid to producers for milk, and ordered that appellant's license as a milk dealer be revoked unless appellant make payment to approximately 400 milk producers from whom it had purchased milk, of amounts fixed in appellees' order for each 100 pounds of milk purchased by appellant. The total payments appellant was ordered to make to such 400 milk producers was over $23,000.

The suit was heard by a court composed of Judges Learned Hand, Bondy and Patterson, convened in accordance with the provisions of Judicial Code, Section 266, United States Code, Title 28, Section 380. At the hearing appellant pressed its application for an interlocutory injunction, appellees filed and served their answer to the bill of complaint, the parties adduced their proofs, appellees moved upon the pleadings and proofs for a final decree dismissing the bill of complaint upon the merits, and the court took the respective motions under advisement, reserving decision thereon. In due course, pursuant to an opinion by Judge Hand, in which the other members of the court concurred, and upon findings made in accordance with Equity Rule 70½, appellant's contentions were overruled and a final decree was entered dismissing the bill of complaint from which final decree appellant has appealed.

VI.

Cases Sustaining Jurisdiction.

Judicial Code, Section 266, United States Code, Title 28, Section 380, provides with respect to a suit commenced to enjoin the enforcement of an alleged unconstitutional statute or an alleged unconstitutional order made by a state administrative officer or body, that a direct appeal may be taken to the Supreme Court of the United States from a final decree granting or denying a permanent injunction in such suit.

Tyson v. *Banton*, 273 U. S. 418.
McCardle v. *Indianapolis Co.*, 272 U. S. 400.
Oklahoma Gas Co. v. *Russell*, 261 U. S. 290.

Respectfully submitted,

SAMUEL RUBINTON,
LEONARD ACKER,
SAMUEL C. DUBERSTEIN,
Counsel for Appellant.

Dated March 31, 1934.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933

No. 988

HEGEMAN FARMS CORPORATION,

Appellant,

against

CHARLES H. BALDWIN, THOMAS PARRAN, JR., AND KENNETH F. FEE, AS MEMBERS OF THE MILK CONTROL BOARD OF THE STATE OF NEW YORK,

Appellees.

CONCESSION AS TO JURISDICTION.

SUGGESTION AS TO PARTIES.

JOINT MOTION TO ADVANCE.

On this 11th day of April, 1934, the appellant has served upon the undersigned solicitor for the appellees a jurisdictional statement as required by the rules of this Court. The solicitor for the appellees acknowledges such service, concedes that the jurisdictional statement is true and correct and that the appeal is properly taken and within the jurisdiction of the Court, and states that no statement in opposition to jurisdiction will be filed on behalf of the appellees or any of them.

Chapter 158 of N. Y. Laws of 1933 (known as the 1933 Milk Control Law) at section 319 contained the following provision:

> "The board shall continue with all the powers and be subject to all the duties and responsibilities prescribed by this article until March thirty-first, nineteen hundred thirty-four, at which time the board shall be deemed abolished and the powers, duties and jurisdiction conferred or imposed upon the board by this article shall terminate."

The present suit arose under that statute, and the appellees were until March 31, 1934, the board therein mentioned. Chapter 126 of N. Y. Laws of 1934 (known as the 1934 Milk Control Law) was enacted on March 30, 1934, effective April 1, 1934, and at sections 254 and 258-j contained the following provisions:

> "The department through the commissioner is hereby vested with the powers heretofore conferred upon the Milk Control Board by Chapter one hundred fifty-eight of the laws of nineteen hundred thirty-three. * * * The transfer by this article to the division of milk control of powers, duties and functions heretofore vested in the milk control board * * * shall be deemed to constitute a continuation thereof and not a new authority, for the purpose of succession to all rights, powers, duties and obligations, and neither such transfer nor the limitation of the period originally designated for duration of the board shall affect any action or proceeding pending at the time of such transfer, and the right to commence an action or proceeding by reason of acts done or rights accrued before such transfer. * * * The rules and orders of the milk control board in effect at the time of the transfer shall remain in full force and effect until otherwise provided by the commissioner."

The provisions of the two Milk Control Laws are in material respects identical, and the orders have not been so changed but that the questions presented to the court below still are live issues between the parties. The appellee Charles H. Baldwin is the commissioner referred to in the

1934 Milk Control Law. The appellee Kenneth F. Fee is now director of the division of milk control and enforces the statute on behalf of the commissioner; he is a proper party but not indispensable in this suit. The appellee Thomas Parran, Jr., since March 31, 1934, has no part in administration or enforcement of the statute. It is agreed that an appropriate order may be made at any time and without notice discontinuing the appeal as to the appellees other than the commissioner, Charles H. Baldwin.

It is desirable from the viewpoint of both the parties to the litigation and of many other milk dealers interested, in New York State and in about a dozen States having similar statutes, that the constitutional questions presented be argued and decided as soon as they can be entertained by the court. Besides the general considerations which favor prompt decision of this litigation is the fact that upon its outcome depends payment to several hundred farmers of at least $23,000.00 for milk delivered many months ago. Although no stay order has been sought or obtained it is practically desirable that there be final decision before money is distributed among so large a group. The appeal is entitled to preferred and speedy determination under Judicial Code sec. 266 and the rules of this Court.

It is respectfully prayed that probable jurisdiction be found and the appeal advanced and set down for argument at a session of the Court to be held in May.

RUBINTON & COLEMAN,
Solicitors for Appellant.
HENRY S. MANLEY,
Solicitor for Appellees.